Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM—1972

No. 72-644

D. C. TRANSIT SYSTEM, INC.,
Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION,
Respondent,

and

DISTRICT OF COLUMBIA CITY COUNCIL, BLACK UNITED FRONT and DIANA K. POWELL,
Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner, D. C. Transit System, Inc. ("Transit") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals") entered in the above matter of July 28, 1972.

CITATIONS TO OPINIONS BELOW

The orders of the Washington Metropolitan Area Transit Commission ("Commission"), Order No. 1216 (served May 19, 1972), Order No. 1216-A (served May

25, 1972), Order No. 1216-B (served May 25, 1972), and Order No. 1219 (served June 16, 1972), are printed at pages A-57 to A-77, A-78 to A-82, A-83 to A-84 and A-85 to A-104 of the Appendix, respectively. The decision of the Court of Appeals (per Circuit Judge Robinson) and the special concurrence of Circuit Judge MacKinnon, dated July 28, 1972, are printed at pages A-1 to A-56 of the Appendix. None of the foregoing have been reported as of the date of this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on July 28, 1972. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals violated fundamental principles of due process in holding that a regulated public utility, which concededly was entitled to "additional revenue" without which it would be required to operate at a loss, was not entitled to receive such additional revenue unless it acquired an additional $6.4 million of equity capital within 90 days?

2. Whether this Court should exercise its discretion in granting certiorari where the Court of Appeals, contrary to orderly judicial administration, has sanctioned the action of an administrative agency in attempting to effect a public takeover of a public utility under circumstances where Congress had expressly prohibited the public takeover of such public utility?

3. Whether this Court should exercise its discretion in granting certiorari where the Court of Appeals has erroneously found that Transit did not properly raise the issue of whether the record supported the Commission's finding

that Transit's management was inefficient and uneconomical, when in fact Transit did expressly raise such issue in the prescribed statutory manner?

STATUTES INVOLVED

The constitutional provisions involved are Amendment V of the Constitution of the United States which provides:

> "No person shall . . . be deprived of . . . property, without due process of law. . . ." U.S.C.A. Const. Amend. 5.

and Amendment XIV which provides:

> ". . . [N]or shall any State deprive any person of . . . property, without due process of law. . . ." U.S.C.A. Const. Amend. 14 § 1.

The statutory provisions involved are Sections 6(a)(4) and 16 of Title II, Article XII of the Washington Metropolitan Area Transit Regulation Compact, Public Law 86-794, 74 Stat. 1031 (1960), 1 D. C. Code § 1410 (1967 ed.) ("Compact"), Section 4 of Transit's Congressional Franchise, Public Law 84-757, 70 Stat. 598 (1956) ("Franchise"), and Section 82(a) of the Washington Metropolitan Area Transit Authority Compact, Public Law 89-774, 80 Stat. 1352, 1 D. C. Code § 1-1431 (1967 ed.).

Section 6(a)(4) of the Compact provides:

> "(4) It is hereby declared as a matter of legislative policy that in order to assure the Washington Metropolitan District of an adequate transportation system operating as private enterprises the carriers therein, in accordance with standards and rules prescribed by the Commission, should be afforded the

opportunity of earning such return as to make the carriers attractive investments to private investors. As an incident thereto, the opportunity to earn a return of at least 6½ per centum net after all taxes properly chargeable to transportation operations, including but not limited to income taxes, on gross operating revenues, shall not be considered unreasonable."

Section 4 of the Franchise provides:

"Sec. 4. It is hereby declared as a matter of legislative policy that in order to assure the Washington Metropolitan Area of an adequate transportation system operating as a private enterprise, the Corporation, in accordance with standards and rules prescribed by the Commission, should be afforded the opportunity of earning such return as to make the Corporation an attractive investment to private investors. As an incident thereto the Congress finds that the opportunity to earn a return of at least 6½ per centum net after all taxes properly chargeable to transportation operations, including but not limited to income taxes, on either the system rate base or on gross operating revenues would not be unreasonable, and that the Commission should encourage and facilitate the shifting to such gross operating revenue base as promptly as possible and as conditions warrant; and if conditions warrant not later than August 15, 1958. It is further declared as a matter of legislative policy that if the Corporation does provide the Washington Metropolitan Area with a good public transportation system, with reasonable rates, the Congress will maintain a continuing interest in the welfare of the Corporation and its investors."

Section 16 of the Compact provides:

"Reconsideration of Orders

16. Any person affected by any final order or decision of the Commission may, within thirty days after the publication thereof, file with the Commission an application in writing requesting a reconsideration of the matters involved, and stating specifically the errors claimed as grounds for such reconsideration. No person shall in any court urge or rely on any ground not so set forth in such application. The Commission, within thirty (30) days after the filing of such application, shall either grant or deny it. If such application is granted, the Commission, after giving notice thereof to all interested persons, shall, either with or without hearing, rescind, modify or affirm its order or decision. The filing of such an application shall act as a stay upon the execution of the order or decision of the Commission until the final action of the Commission upon the application, except that upon written consent of the applicant such order or decision shall not be stayed unless otherwise ordered by the Commission. No appeal shall lie from any order of the Commission until an application for reconsideration has been made and determined."

Section 82(a) of the Washington Metropolitan Area Transit Authority Compact provides:

"Condemnation

82. (a) The Authority shall have the power to acquire by condemnation, whenever in its opinion it is necessary or advantageous to the Authority to do so, any real or personal property, or any interest therein, necessary or useful for the transit system

authorized herein, except property owned by the United States, by a signatory, or any political subdivision thereof, or by a private transit company."

STATEMENT OF THE CASE

Transit is a corporation established under the laws of the District of Columbia on July 9, 1956 and is engaged in the mass transportation of passengers for hire within the District of Columbia and between certain points within the District of Columbia and the States of Maryland and Virginia pursuant to its Franchise.

The Proceeding Before the Commission

On December 28, 1971, largely as a consequence of its increased labor costs, Transit filed an application for new fares ("Application") with the Commission. The Application showed that, under existing fares, Transit would have a net loss of approximately $3.5 million after interest expenses from its operation for the future annual period. The Application requested a schedule of new fares that would enable Transit to earn a fair and reasonable rate of return in the future annual period.

On May 19, 1972, after 24 days of formal hearings during which ten protestors and intervenors were admitted and a record of 4,483 transcript pages was compiled, the Commission served Order No. 1216 wherein it denied Transit's Application for an increase in its fares. The Commission conceded that Transit was entitled to "additional revenue" (Order No. 1216, p. A-64) without which it would be required to operate at a loss. Nevertheless, the Commission refused to provide Transit with a new schedule of fares. Instead the Commission preconditioned any future increase in Transit's fares on Transit's willingness to make certain changes in its debt-equity ratio within 90 days

by increasing equity capital by $6.4 million in cash and using it (a) to retire a portion of its outstandng debt, (b) to purchase new buses solely for cash, and (c) to improve certain aspects of its service.

During the hearings, no consideration was given, nor was any evidence introduced by anyone, nor was any suggestion made by anyone as to the imposition of preconditions to a fare increase, nor as to any time deadline (90 days or otherwise), nor as to whether such a period was reasonable, nor as to whether the action required by the Commission could in fact be accomplished during such period.* In his concurring opinion, Judge MacKinnon said that he joined in the majority opinion of the Court of Appeals only because "there is no basis *on this record* for concluding that it would be impossible for Transit to comply with the conditions imposed by the Commission."(Court of Appeals decision, p. A-55). However, since no evidence was introduced at the hearings concerning the necessity of completing the debt-equity ratio changes either prior to any stated deadline or as a pre-condition to a fare increase, it was impossible for there to be anything "in the record" showing that Transit could *not* comply with such conditions.**

The Commission found that Transit's failure to secure more equity capital and the resulting failure to retire debt, purchase new buses,*** and make certain improvements in

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*Subsequent events have shown that the Commission's orders could not be complied with within such time period and, consequently, a fare increase was precluded by Order No. 1216.

**To the extent the "record" can be said to include Transit's Application for Reconsideration, at the date that document was filed (June 1, 1972), there was no way of Transit's knowing whether, with due diligence, compliance with the preconditions would be possible.

***Transit's failure to purchase new buses has been occasioned by the failures of the Commission's projections of revenues and expenses in prior rate proceedings to meet expectations (Transit's Exhibit No. 29).

its service* indicated that its management was "not efficient and economic". (Order No. 1216, p. A-74). Finally, the Commission expressed its displeasure with the Congress' failure to forestall recent increases in Transit's fares by failing to enact subsidy legislation.**

On May 25, 1972, Vice-Chairman Sullivan served a dissenting opinion, Order No. 1216-A, in which he explained why he believed Order No. 1216 was "violative of the Constitution" and "an encroachment on the prerogative of [Transit's] Management." Vice-Chairman Sullivan stated:

> "Transit has proven beyond any doubt, in this proceeding at least, that its *expenses exceed revenues.* In my view the action of the majority to delay or

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*The Commission found that Transit's service was inadequate based on an increase in the number of missed trips by Transit buses in 1972 over 1971 (Order No. 1219, pp. A-95 to A-96, n. 10), although the staff's own witness, Charles W. Overhouse, stated that the number of missed trips was "insignificant" (Tr. 2267, 3116-17). The percentage of missed trips was less than one-tenth of one percent of all trips operated (Tr. 2267-2268).

**Order No. 1216, pp. A-76 to A-77 states:

> "We have tried very hard to avoid that result [any increase in Transit's fares] through legislative channels. Three years ago we proposed to the Congress a subsidy for D. C. Transit riders so that the fare could remain at the then-existing level of 30 cents. We even suggested that the fare should be lowered to 25 cents and kept at that level through public subsidy. Our plea at that time was given little attention. We warned then that the failure to provide a subsidy would inevitably result in higher and higher fares. Again, in this session of the Congress, during the pendency of this very rate case, we appealed to the Congress for a subsidy in order to maintain the bus fare at the 40-cent level. We pointed out the very destructive impact of increasing fares. But the House of Representatives overwhelmingly rejected the provision of a subsidy. Whatever caused that result, it is a failure of government to respond to the needs of the community. Until that failure is remedied, the spectre of higher bus fares and their destructive impact, will be with us."

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reject consideration of the need for a fare increase in order to effect changes in capital structure and financing amounts to nothing more than an attempt to 'blackjack' Transit, by subjecting a portion of the property of the Company to 'confiscation,' which in itself is violative of the Constitution.

"As a reasonable alternative, the Commission can assume, for rate-making purposes, what it deems to be an appropriate equity-debt ratio and project revenue requirements on this assumed capital structure and set rates accordingly. The approach taken by the majority has left Transit literally 'dangling', by simply stating 'Put in more capital—irrespective of its source and moreover, irrespective of the very probable lack of potentiality of any such source.'

"This attitude, in my judgment, amounts to an encrouchment [sic] on the prerogative of Management and thereby preempts the inviolate rights of the Company to manage its own affairs." Order No. 1216-A at A-79.

On June 1, 1972, Transit filed with the Commission, pursuant to Section 16 of the Compact, an application for reconsideration* of Order No. 1216. In its Application for Reconsideration, Transit specifically stated the errors of the Commission. Transit stated that the Order No. 1216 was invalid because, among other reasons, (a) it compelled Transit to operate at a loss in violation of the due process clauses of the Constitution,** (b) it represented an attempt by the Commission to force a public takeover of

*Transit's "Notice of Invalidity of Order No. 1216 And, In The Alternative, Application For Reconsideration of Order No. 1216," item number 60 on the "Index of Record" filed by the Commission with the Court of Appeals.

**See Transit's Application for Reconsideration, Paragraphs 8 and 9.

Transit without due process,* and (c) the Commission's finding that Transit's management was inefficient and uneconomical was not supported by the record.**

On June 16, 1972 the Commission served Order No. 1219 in which it denied Transit's Application for Reconsideration. Vice-Chairman Sullivan again dissented. On that same date, Transit filed a petition with the Court of Appeals for the review of Commission Orders Nos. 1216 and 1219, pursuant to Section 17(a) of the Compact.

The Court of Appeals Decision

In its July 28, 1972 decision, the Court of Appeals affirmed the orders of the Commission. In so doing, the Court of Appeals held (a) that Transit could be compelled to operate at a loss since its management was found by the Commission to be inefficient and uneconomical (Court of Appeals decision pp. A-52 to A-54) and (b) that Transit had failed to properly raise the issue of whether the record supported the Commission's findings that Transit's management was inefficient and uneconomical (Court of Appeals decision, pp. A-33 to A-36).

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*See Transit's Application for Reconsideration, Paragraph 42.

**See Transit's Application for Reconsideration, Paragraphs 17 and 31.

REASONS FOR GRANTING THE WRIT

I

THE COURT OF APPEALS VIOLATED THE FUNDAMENTAL PRINCIPLES OF DUE PROCESS IN HOLDING THAT A REGULATED PUBLIC UTILITY, WHICH CONCEDEDLY WAS ENTITLED TO "ADDITIONAL REVENUES" WITHOUT WHICH IT WOULD BE REQUIRED TO OPERATE AT A LOSS, WAS NEVERTHELESS NOT ENTITLED TO RECEIVE SUCH ADDITIONAL REVENUES UNTIL IT HAD ACQUIRED AN ADDITIONAL $6.4 MILLION OF EQUITY CAPITAL WITHIN 90 DAYS

A. Fundamental Principles of Due Process Require That The Return From Operations Allowed to a Regulated Public Utility Cannot be Set at an Amount Below the Point of Confiscation

It is not seriously questioned that Transit will be forced to operate at a substantial loss in the future annual period at present fares.* Hence, under present fares, Transit *cannot* cover the interest on its debt; it *cannot* pay dividends; it *cannot* retain a sufficient surplus to finance down payments on equipment; it *cannot* ensure continued adequate service; and it *cannot* achieve financial strength and stability—all of which the Court of Appeals had previously stated were items which were to be covered by operating revenues in order for a rate structure to be fair and reasonable. *D. C. Transit System, Inc.* v. *Washington Metropolitan Transit Comm'n*, 350 F. 2d 753, 778 (D. C. Cir. 1965).

By forcing Transit to operate at a loss, the Court has virtually foreclosed the possibility of attracting new equity

*The Court of Appeals decision, p. A-45, n. 183.

capital to Transit while demanding that Transit attract such additional capital as a precondition to a rate increase.* It is indeed clear, that, under the circumstances, Transit could not attract debt capital either. As Judge MacKinnon noted in his concurring opinion, the Commission's action in "*ordering* Transit, in its ailing condition, to attract such large sums of new money may be analogous to a doctor ordering a patient who had just suffered a severe heart attack to get up and run a marathon."

Fundamental principles of due process require that a governmentally-fixed rate cannot confine a public utility's return from operations to an amount below the point of confiscation. This basic proposition has been reiterated by this Court time and time again. *Denver Union Stock Yard Co.* v. *United States*, 304 U. S. 470, 475 (1938); *United Rys. & Elec. Co.* v. *West*, 280 U. S. 234, 249 (1930); *Blanton* v. *Belt Line Ry.*, 268 U. S. 413, 416-17 (1925); *Bluefield Water Works & Improvement Co.* v. *West Virginia Pub. Serv. Comm'n* 262 U. S. 679, 690 (1923).

In *Bluefield Water Works & Improvement Co., supra,* this Court stated:

> "Rates which are not sufficient to yield a reasonable return on the value of the property used, at the time it is being used to render the service, are unjust, unreasonable, and confiscatory, and their enforcement deprives the public utility company of its property in violation of the 14th Amendment." 262 U. S. at 690.

*It should be noted that Transit has paid no dividends since 1966 so it cannot be argued that Transit's financial plight is due to benefits derived by Transit's stockholders (Transit Exhibit No. 8).

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Until its recent decision in this case, the United States Court of Appeals for the District of Columbia had indicated its agreement with this basic principal. In denying a motion by the District of Columbia Government to stay the Commission's order in the last rate proceeding involving Transit,* the Court of Appeals as recently as July 10, 1970 stated:

> "Whatever the ultimate solution of the troubled transit problem, all the interested parties may as well start from the premise that if the company operates at all, *it cannot be compelled to operate at a loss.* For the interested parties here or the general public to proceed on any other premise is to engage in wishful thinking which can only lead to bitter frustration and disillusion." *District of Columbia* v. *Washington Metropolitan Area Transit Comm'n*, Appeal No. 24,415, (D. C. Cir. decision dated July 10, 1970) (Emphasis supplied).

B. Even Assuming That a Public Utility Could be Required to Operate at a Loss if Its Management Were Inefficient and Uneconomical, There is no Substantial Evidence to Support the Finding That Transit's Management is Uneconomical and Inefficient, and, Therefore, Transit should be Allowed a Return From Operations Above the Point of Confiscation.

In Order No. 1216, the Commission concludes that Transit's management is not economic or efficient because Transit has a high debt-equity ratio. As a result of Transit's

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Re D. C. Transit System, Inc., 85 P. U. R. 3d 1 (Washington Metropolitan Area Transit Comm'n 1970).

lack of capital, the Commission found that Transit has been unable to (a) reduce its outstanding debt, (b) purchase new buses, and (c) make certain improvements in its service. However, the record shows (1) that Transit's lack of capital was in no way related to the level of services offered nor to any improvements therein and (2) that Transit's failure to reduce its outstanding debt and its failure to purchase new buses has been occasioned by the repeated failure, in prior rate cases, of the Commission's projections of revenues and expenses to meet expectations.*

In addition, the Commission's finding that Transit's service was inadequate was based on an increase in the number of Transit's missed trips in 1972 over 1971 (Order No. 1219, pp. A-95 to A-96, n. 10). However, there is no substantial evidence in the record which would support the Commission's findings. In the hearings, Charles W. Overhouse, the chief engineer of the Commission staff and the person responsible for determining the adequacy of Transit's service, arbitrarily chose the weekday of April 10, 1972 to test the adequacy of such service. On that date Transit reported that it had missed 20 trips (Tr. 2267). In his testimony, Mr. Overhouse conceded that Transit operated approximately 12,000 trips on an average weekday, such as April 10, 1972 (Tr. 2268). Thus, *the trips missed (20) amounted to only one-tenth of one percent of the trips operated (12,000)* (Tr. 2267-2268). Mr. Overhouse conceded that the number of Transit's missed trips was "insignificant" (Tr. 2267, 3116-3117). This certainly does not constitute substantial evidence in the record in this case which would support the Commission's finding that

*The Commission concedes that part of Transit's financial problems are due to the fact that revenue forecast in the Commission's prior rate orders, never fully materialized (Order No. 1216, p. A-73). Indeed, such unreasonable regulatory practices on the part of the Commission have played a very important part in Transit's current financial problems.

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Transit's service was inadequate because of the number of its missed trips.*

The only evidence before the Commission clearly showed that Transit's operations have been efficient and that service has been adequate. No substantial evidence was adduced to rebut the extensive analysis of statistical data on the operations of Transit and other mass transportation systems made by Transit's expert witness, John F. Curtin (Tr. 1021-40) which led him to conclude that:

> "[Transit] is manifestly a well managed and efficient system with a potential for being possibly the best in the industry if it had adequate capital resources." Tr. 1032.

The expert witness of the Commission's staff, Pasquale A. Loconto, expressly disclaimed any attempt on his part to evaluate the efficiency of Transit's management for any purpose, testifying as follows:

> "I am in no way trying to measure the efficiency of management." Tr. 2069.

Finally, the Commission failed to explain the obvious conflict of its present findings and its findings at the conclusion of the last rate proceeding, in which the Commission found that no facts had been presented "indicating that Transit's basic problems lie in inadequate management" nor could it find any "basis in the record for saying that the

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*The record shows that Transit has repeatedly applied to the Commission for permission to reduce or eliminate unprofitable service so as to improve its efficiency. With reduced ridership it is essential for an efficiently run company to reduce operating expenses to meet the reduced demand. However, the Commission has invariably prevented Transit from putting such reductions into effect, thereby decreasing the efficiency of Transit's overall operations (Tr. 764, 777, 783-84, 933-38, 2818-28, 2854-62, 3052).

need for additional revenues could be taken care of by a more honest, economical and efficient management." *Re D. C. Transit System, Inc.* 85 P. U. R. 3d 33, 37 (Washington Metropolitan Area Transit Comm'n 1970).

It is clear from the foregoing that the Commission has sought to penalize Transit for one crime and one crime only—the fact that Transit has insufficient money. The real complaint of the Commission and the problems of Transit which the Commission tried to camouflage by its findings that Transit's management was inefficient and uneconomical was that Transit had insufficient money. The record is clear that Transit has not been allowed adequate rates of return in its prior rate proceedings before the Commission (Transit's Exhibit No. 29; Order No. 1216, p. A-73). Over the years, as a result of this, Transit has been unable to produce an earned surplus or attract additional equity to improve its debt-equity ratio and has been unable to conclude satisfactory financial arrangements to finance the purchase of new buses. The fact that the Commission had "ordered" Transit to improve its capital structure and buy new buses to improve its efficiency and economy is academic unless the Commission allows Transit to operate profitably. For the Commission to issue such "orders" without giving Transit the means to comply is as effective and productive as the legendary order of Xerxes that three hundred lashes be inflicted upon the rebellious sea.*

Thus, even if, *arguendo*, a utility could be compelled to operate at a loss if it were found to be uneconomical or inefficient, there is no substantial evidence in the record to

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*That punishment was inflicted upon the waters of the Hellespont as a reprisal for the storm and waves which destroyed Xerxes' newly constructed pontoon bridge across the Hellespont and with it his plans to attack Greece. *The History of Herodotus*, Vol. II, Book VII, ch. 33-36, pp. 134-135 (E. H. Blakeney ed.; London, Dent Publishing Co. 1964).

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support such a finding. Clearly, therefore, even under such a regulatory theory, fundamental principles of due process require that Transit be allowed a return from operations in an amount above the point of confiscation.

C. Even Assuming that Management of a Public Utility Were Inefficient and Uneconomical, Fundamental Principles of Due Process Require that a Return From Operations Be Allowed to Transit in an Amount Above The Point of Confiscation

Even assuming, *arguendo*, that lack of efficiency and economy could be attributed to Transit's management because of its failure to obtain new equity capital so that it could (a) reduce its outstanding debt, (b) purchase new buses, and (c) improve certain aspects of its service, that would not justify the action of the Court of Appeals and the Commission in requiring Transit to operate at a loss.

For many years, regulatory agencies have provided a greater rate of return for efficient management and a lesser return for inefficient management. As Justice Brandeis said, concurring in *Missouri ex. rel. Southwestern Bell Tel. Co.* v. *Missouri Pub. Serv. Comm'n*, 262 U. S. 276 (1923).

> "The reasonable rate to be prescribed by a commission may allow an efficiently managed utility much more [than the cost of conducting the business]." 262 U. S. at 291.

Similarly, where less than adequate service and management has been provided, a company's rate of return has been confined to the lower level of reasonableness. See, *e.g. Re Norwalk Independent Tel. Co.*, 27 P. U. R. 3d 17 (Wis. Pub. Serv. Comm'n 1959); *Re General Tel. Co.*, 28 P. U. R. 3d 452 (Ga. Pub. Serv. Comm'n 1959). However, inefficient management is no basis for requiring a company to operate at a loss.

The efficiency of the management of a utility should not be solely determinative of its rate of return. In *Elyria Tel. Co. v. Public Util. Comm'n*, 158 Ohio St. 441, 110 N. E. 2d 59, 98 P. U. R. (N. S.) 246 (1959), the Supreme Court of Ohio held that the commission may require both adequate service and reasonable rates, but that although the two are related, they "are not wholly dependent on each other." 110 N. E. 2d at 62. In that case, the current rates were found to be inadequate in meeting the utility's needs, and the issue was whether an increase could be conditioned on improvements in service. The Ohio Supreme Court said that such a precondition could *not* be imposed upon the utility. As that Court stated:

> "A utility to survive must receive a fair return on its property. Otherwise capital will not be attracted to furnish the funds for the new equipment needed to meet the demands of increased population and the consequential necessity for increased service. The Commission's order as made has the effect of creating serious difficulties for the company. A situation is present where the company needs an increase in rates to attract capital to buy new equipment and to meet increased demands, and the Commission says, in effect, 'we will give you the new rates to attract the new capital to purchase new equipment when you show that you have installed the new equipment.' Adoption of such an attitude would hamstring the utility.
>
> "A Public Utility Commission may not so act as to confiscate the property of a utility, and where it is determined that adequate rates do not exist, an order granting an increase but suspending the same until such time as certain facilities and improvements are provided does have that effect." 158 Ohio

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St. at 447, 110 N. E. 2d at 62-63, 98 P. U. R. (N. S.) at 249-50.

The reasoning of the *Elyria* decision has been followed by the highest courts of several states. See, *Village of Apple River* v. *Illinois Commerce Comm'n*, 18 Ill. 2d 578, 165 N. E. 2d 329, 53 P. U. R. 3d 310 (1960); *Florida Tel. Corp.* v. *Carter*, 70 So. 2d 508, 3 P. U. R. 3d 145 (Fla. 1954); *General Tel. Co. of Mich.* v. *Public Serv. Comm'n*, 341 Mich. 620, 67 N. W. 2d 882, 8 P. U. R. 3d 97 (1954). As stated in an early New Jersey case, "A starved utility is in no better position to render proper service than a starved horse or a motor car without fuel." *Elizabeth* v. *Board of Pub. Util. Comm'rs*, 123 Atl. 358, 360 (Ct. Err. & App. 1924.

In support of the proposition that an inefficient and uneconomical public utility could be required to operate at rates which result in a loss, the Court of Appeals cites four cases.* Of the four cases, *In re Metropolitan Coach, supra,* is the only case cited in which a public utility was required to operate at a loss. In that case a rate increase was denied by the Public Utilities Commission of the District of Columbia in spite of an operating deficit on the part of the public utility. However, in that case, the commission found seriously inadequate service conditions which had "repeatedly" been brought to the attention of the company. 1915D P. U. R. at 741. It should be noted that the *Metropolitan Coach* decision by the District of Columbia Public Utilities Commission has not been followed, or even cited, since 1915; such a regulatory agency decision is a dubious precedent as the only authority supporting a decision by a United

**New Jersey Cent. Traction Co.* v. *Board of Public Util. Comm'n*, 96 N. J. L. 90, 113 A. 692, 696 (1921); *Rockville Water & Aqueduct Co.*, 78 P. U. R. 3d 45, 52 (Conn. Pub. Util. Comm'n 1968); *In re Metropolitan Coach*, 1915D P. U. R. 740, 741 (D. C. Pub. Serv. Comm'n 1915); Cf. *Hamilton* v. *Caribou Water, Light & Power Co.*, 121 Me. 422, 117 A. 582, 583-84 (1920).

States Court of Appeals that a public utility can be required to operate at rates which are confiscatory.

In *New Jersey Cent. Traction Co., supra*, the court held that when service was *unsafe and inadequate*, such service condition could be considered in denying an increase in rate. However, in that case, no claim was made that the utility would be compelled to operate at a loss if the rate increase were denied. Thus, that case is clearly distinguishable on its facts from the present case.

In *Rockville Water and Aqueduct Co., supra*, the utility was making a small *profit* but lacked the funds for necessary improvements. It was denied a rate increase because the water it supplied was substandard. Again, from the fact that the utility in that case was not compelled to operate without *some* measure of return distinguishes it from the present case.

In *Hamilton* v. *Caribou Water, Light & Power Co., supra*, the Supreme Judicial Court of Maine declined to review a commission's decision as to the adequacy of service and the confiscatory nature of the rates, stating:

> "In case the rates established by the Commission prove in practice to be confiscatory, they may be corrected upon a new petition. . . ." 117 A. at 584.

Thereafter, the *Hamilton* case was effectively overruled by *City of Bangor* v. *Public Util. Comm'n*, 156 Me. 455, 167 A. 2d 6 (1960). It should be noted that in Transit's case, the rates are conceded by both the Commission and the Court of Appeals to require Transit to operate at a loss—there is no need to await proof that they are confiscatory.

The obvious differences between these four cases and Transit's situation clearly indicate that they are not support for the proposition that Transit may be compelled to operate at a loss. Transit submits that the present day rule of law in the utility field on the relationship between adequacy

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of service and entitlement of a fare increase is set forth in *Re New York Telephone Co.*, 84 P. U. R. 3d 321, 358 (N. Y. 1970). In that case the New York Public Service Commission recognized that additional funds were required to improve service which was less than adequate and *granted* the rate increase in order that more adequate service could be provided.

Clearly, fundamental principles of due process require that a return from operations be allowed to Transit in an amount above the point of confiscation even if, *arguendo*, its management were found to be uneconomical and inefficient.

II

THIS COURT SHOULD EXERCISE ITS DISCRETION IN GRANTING CERTIORARI WHERE THE COURT OF APPEALS, CONTRARY TO ORDERLY JUDICIAL ADMINISTRATION, HAS SANCTIONED THE ACTION OF AN ADMINISTRATIVE AGENCY IN ATTEMPTING TO EFFECT A PUBLIC TAKEOVER OF A PUBLIC UTILITY UNDER CIRCUMSTANCES WHERE CONGRESS HAD EXPRESSLY PROHIBITED THE PUBLIC TAKEOVER OF SUCH PUBLIC UTILITY BY CONDEMNATION

This Court should exercise its discretion in granting certiorari in the present case because of its importance to orderly judicial administration. By its action, the Court of Appeals has sanctioned an administrative agency's efforts to force a public takeover of a privately-owned public utility to circumvent the express statutory prohibition against such public takeover by condemnation. As such, the decision of the Court of Appeals is unprecedented and should be reviewed by this Court. *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501 (1947); Stern and Gressman, *Supreme Court Practice* 177 (4th ed. 1969).

In setting the preconditions to any increase in Transit's fares, the Commission was making a conscious decision to require Transit to operate at a loss, thereby forcing Transit to lose so much money that it would be forced to suspend operations or go into receivership and thus effecting the public takeover of Transit. In its Order No. 1216, the Commission clearly states that Transit was entitled to "additional revenue". Nevertheless, the Commission stated that it was trying "very hard" to avoid *any* increase in Transit's fares and it critized Congress for its failure to take action to forestall an increase. More specifically, the Commission stated that the failure of Congress to provide a subsidy for Transit represented "a failure of government to respond to the needs of the community." (Order No. 1216, pp. A-76 to A-77).

Only weeks before the issuance of Order No. 1216, the Chairman of the Commission, Jeremiah C. Waterman, testified that Transit was entitled to additional revenues of approximately $3-4 million* (See House of Representatives, U. S., Report of Proceedings, Hearings held before Subcommittee on Business, Commerce and Fiscal Affairs of the Committee on the District of Columbia re H. R. 2500 and H. R. 13019, Friday, April 28, 1972, Vol. 3, p. 166 (line 5), p. 167 (lines 5-6), and p. 200 (line 18). There is no reason given for the sudden change of position by the Commission but it is quite apparent that, having decided that a fare increase would not be a socially or politically

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*On April 14, 1972, Chairman Waterman stated:

"Only it has reached a very severe and critical point now. Unless some subsidy is provided or the fare is increased from 40 to 50 cents, the company will find it very difficult to continue in operation. In fact, they won't be able to." "District of Columbia Appropriations for 1973" Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, Ninety-Second Congress, Second Session, Part I, Page 675.

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acceptable result, the Commission decided to remedy the Congressional failure to forestall a fare increase by subsidies by forcing a public takeover via a receivership since Congress had expressly forbidden public takeover of Transit by condemnation.

The Commission's action is in accordance with that advocated by the District of Columbia Government in this and in prior cases in which it was a party or intervenor. See, e.g., Re D. C. Transit System, Inc., 85 P. U. R. 3d 1, 24-25 (Washington Meropolitan Area Transit Comm'n 1970). In these cases the District of Columbia Government has opposed all fare increases on the ground that public ownership of Transit was the only solution to Transit's need for increased revenues. This being the case, the District of Columbia took the position that such public ownership would be attained sooner if Transit were refused permission to charge fares which would provide a fair and reasonable rate of return, and, *moreover*, that the District of Columbia Government could acquire Transit's assets more cheaply if no fare increase were granted and Transit were compelled to operate at a loss.

The same social policy decision that fares charged by Transit should not be increased has been made by the federal courts in the District of Columbia. In an action* brought against Transit on May 26, 1972 to prevent Transit from increasing its fares, the United States District Court for the District of Columbia made the following social-political analysis of the problem instead of looking to Transit's rights under the Constitution, the Compact and the Franchise:

"Public transportation in this city and country is in a crisis. It has reached such proportions here that the whole problem requires careful attention in

*Civil Action No. 1060-72.

this city now from the Congress and all appropriate governmental agencies. If full public ownership or some form of subsidy is found to be the answer, we must accept this. . . ."

". . . [I]t is hoped that the Mayor and the parties will consider this crisis in our city as a matter of the highest priority which may deserve the immediate attention of the leadership of both Houses of Congress and their appropriate Committees, as well as the Federal Government, since this city and area and its public transportation system are so interdependent. There is no doubt that we cannot afford to be without a system which is sound, efficient, safe and provided at rates which all people regardless of economic status can enjoy."

The action of the Court of Appeals in sanctioning these attempts to force the public takeover of Transit by a regulatory agency which does not have jurisidiction to do so and in contravention of the specific Congressional action which provided that the assets of Transit could not then be taken over by condemnation proceedings (see Section 82(a) of the Washington Metropolitan Area Transit Authority Compact, *supra*) is unprecedented and contrary to orderly judicial administration. Clearly the action of the Commission exceeded its statutory authority. Similarly, the Court of Appeals exceeded its discretion in sanctioning the action of the Commission. Such an objective—the public takeover of a company—can only be accomplished with legislative authorization. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 103 F. Supp. 569, *aff'd*, 343 U. S. 579 (1952).

It is not the function of the Commission or the courts to consider the social or political desirability of a course of conduct in the regulation of the rates to be charged by a public

utility. It is for the legislature to make such decision, and any failure by the legislature to act may not be circumvented or remedied by the regulatory agency no matter how desirable such conduct. It is for the regulatory agency, in this case the Commission, to set the fares of Transit in accordance with the standards set by the Constitution, the Compact and the Franchise. It is for the Court of Appeals to insure that the Commission does not take onto itself the powers of the legislature to authorize condemnation or to assume the power of condemnation which was expressly withheld. And this the Court of Appeals must do in accordance with rules set forth in the Constitution, the Compact and the Franchise, not social or political consequences.

The result of the action of the Court of Appeals has been to set a precedent pursuant to which any regulatory agency in the nation could force a public takeover of a utility either in violation of the condemnation procedures provided by the legislature or in direct contravention of the intent of the legislature. The proper procedure and the one required for orderly judicial administration would have been for the Court of Appeals to have remanded the case to the Commission with directions to use only the statutory procedures set forth in the Compact and comply with the procedural principles of due process which require that governmentally-fixed rates cannot confine a public utility's return from operations to an amount below the point of confiscation.

III

THIS COURT SHOULD EXERCISE ITS DISCRETION IN GRANTING CERTIORARI WHERE THE COURT OF APPEALS HAS ERRONEOUSLY FOUND THAT TRANSIT DID NOT PROPERLY RAISE THE ISSUE OF WHETHER THE RECORD SUPPORTED THE COMMISSION'S FINDING THAT TRANSIT'S MANAGEMENT WAS INEFFICIENT AND UNECONOMICAL, WHEN IN FACT TRANSIT DID EXPRESSLY RAISE SUCH ISSUE IN THE PRESCRIBED STATUTORY MANNER

On June 1, 1972, Transit filed with the Commission its Application for Reconsideration of Order No. 1216. In this Application for Reconsideration, Transit specifically listed at least 52 errors of the Commission in Order No. 1216. One of many errors listed by Transit was that the Commission's findings that Transit's management is inefficient and uneconomical was not supported by the record. Such error was specifically included in paragraphs 17 and 31 of the Application for Reconsideration, where Transit alleged:

> "(17) In [Order No. 1216], the Commission has not 'respected procedural requirements, * * * made findings based on substantial evidence, and * * * applied the correct legal standards to its substantive deliberations' as required by *Williams* v. *WMATC, et al., supra,* 415 F. 2d at 942."

> "(31) [Order No. 1216] states that 'this record shows the present capital structure and debt structure of Transit do not reflect economic and efficient management' whereas the maintaining of a particular debt-equity ratio is not by itself a sufficient basis for a finding that Transit management is not 'economic and efficient'."

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Clearly, the foregoing paragraphs of Transit's Application for Reconsideration constitute a specific allegation by Transit that the Commission's findings on Transit's management are not supported by the evidence in the record. Nevertheless, the Court of Appeals refused to even consider Transit's arguments on this point, finding that Transit had failed to "state specifically" any "insufficiency of the supporting evidence as a ground for disturbing the Commission's findings on the caliber of Transit's management and service." Court of Appeals decision, p. A-35.

A. The Court of Appeals Violated Fundamental Principles of Due Process in Refusing to Consider Transit's Argument That the Record Does not Support the Commission's Finding that Transit's Management Was Inefficient and Uneconomical

The record is clear that Transit in fact did raise the issue of the insufficiency of the evidence upon which the Commission based its finding that Transit's management was "not efficient and economical." By refusing to consider such argument, the Court of Appeals has effectively deprived Transit of due process of the law. *Denver Union Stock Yard Co.* v. *United States, supra; United Rys. & Elec. Co.* v. *West, supra; Blanton* v. *Belt Line Ry., supra; Bluefield Water Works & Improvement Co.* v. *West Virginia Pub. Serv. Comm'n, supra.*

The effect of the Court of Appeals action has been to affirm the finding of the Commission regarding the caliber of Transit's management without reviewing the basis upon which the crucial finding was made and without giving Transit an opportunity to be heard on a point which it had properly raised below. As such the Court of Appeals' refusal to consider Transit's argument represents a violation of fundamental principles of due process. *Ibidem.*

B. Orderly Judicial Administration Requires This Court to Exercise Its Discretion in Granting Certiorari and Remanding the Proceeding to the Court of Appeals With Direction that the Court of Appeals Consider Transit's Argument that the Record Does Not Support the Commission's Finding that Transit's Management Was Inefficient and Uneconomical

By its action, the Court of Appeals has also effectively frustrated orderly judicial administration. *Gulf Oil Corp.* v. *Gilbert, supra;* Stern and Gressman, *Supreme Court Practice* 177 (4th ed. 1969).

Proper judicial procedure and orderly judicial administration require that the Court of Appeals consider arguments properly raised on appeal. In the present case Transit has been denied review of its argument that a crucial finding of the Commission, namely that Transit's management is inefficient and uneconomical, is not supported by the record.

The effect of this action of the Court of Appeals is to frustrate appellate review of administrative decisions and avoid a decision on the merits of the argument presented. However, Transit properly raised the issue below and is clearly entitled to a decision on the merits of its argument that there is no support in the record for such findings of the Commission.

Transit submits that orderly judicial administration requires that this Court remand the decision to the Court of Appeals with directions to consider Transit's argument on the merits. In his concurring opinion, Judge MacKinnon recognized that a remand of this case would be appropriate. As Judge MacKinnon stated:

> ". . . I believe that the Commission's disposition of this matter is only temporarily valid because of the

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uncertainties left open by the present inadequate record. I do not consider that the Commission has fully faced the entire problem." The Court of Appeals decision, pp. A-55 to A-56.

Accordingly, this Court should remand the decision of of the Court of Appeals with directions to the Court to consider Transit's argument on the merits.

CONCLUSION

For all of the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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